

No. \_\_\_\_\_

05-696 NOV 28 2005

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In The

**Supreme Court of the United States**

JAMES RAY CREED,

*Petitioner,*

v.

STATE OF MICHIGAN,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The Michigan Court Of Appeals**

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

Can a Michigan state court enhance the sentence of a criminal defendant beyond that mandated by statutory guidelines based on facts not found by a jury beyond a reasonable doubt?

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## **CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS**

There are two orders entered by courts relevant to this petition. The Michigan Court of Appeals issued an order on February 23, 2005 that has not been published but has been reproduced in the appendix to this petition. (App. 1.) The Michigan Supreme Court issued an order on August 30, 2005 that is published as *People v. Creed*, 474 Mich. 856; 702 N.W.2d 579 (2005) and that has also been reproduced in the appendix to this petition. (App. 30.)

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## **BASIS FOR JURISDICTION**

Petitioner seeks review of the February 23, 2005 opinion of the Michigan Court of Appeals denying Petitioner leave to appeal his sentencing in light of this Court's decision in *Blakely v. Washington*, 542 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000). On August 30, 2005, the Michigan Supreme Court denied Petitioner leave to appeal the Michigan Court of Appeals' decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

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## **CONSTITUTIONAL PROVISIONS INVOLVED**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

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### STATEMENT OF THE CASE

The facts in the instant case largely mirror those in *Blakely*. Petitioner pled guilty to assault with intent to commit sexual penetration on November 10, 2003, in the Osceola County Circuit Court. (App. 26.) The plea bargain provided for dismissal of an additional count of kidnapping, and that the sentencing guidelines would not be scored for the kidnapping count. (App. 16-23.) During the plea hearing, Petitioner admitted that he grabbed the complainant around the neck, pulled out a weapon and tried to force her to have sexual intercourse with him. (App. 24-26.)

The trial court scored statutory sentencing guidelines for touching with a knife (Offense Variable 1), the fact of a knife (Offense Variable 2), severe psychological injury (Offense Variable 4), movement of the victim (Offense Variable 8), multiple victims (Offense Variable 9) and predatory conduct (Offense Variable 10). (App. 28-29.) The facts the court applied to Offense Variables 4, 8, 9 and 10, however, were never determined by a jury beyond a reasonable doubt. Rather, they were based on judicial fact-finding. Defense counsel objected to the scoring of Offense Variables 4, 8 and 9 at the time of sentencing but the trial court overruled these objections. (App. 3-8.)

The inclusion of these Offense Variable increased the guidelines range for Petitioner's sentence from 0 to 11 months, *see* Mich. Comp. Laws Ann. § 777.65 (West. 2005)



(Class I and), to 10 to 23 months. (App. 29.) On January 21, 2004, the Honorable Lawrence C. Root sentenced Petitioner to a term of 23 months to ten years imprisonment.

Petitioner appealed his sentence to the Michigan Court of Appeals. Petitioner argued that the trial court's scoring of Offense Variables 4, 8 and 9 based on facts not found by a jury beyond a reasonable doubt violated his Sixth Amendment right to trial by jury as held by this Court in *Blakely*. On February 23, 2005, the Court of Appeals denied Petitioner leave to appeal "for lack of merit in the grounds presented." (App. 1.) Presumably, the Michigan Court of Appeals based its determination on the Michigan Supreme Court's statement *People v. Claypool*, 470 Mich. 715; 684 N.W.2d 278 (2004), that *Blakely* does not apply to Michigan's sentencing guidelines. See, e.g., *People v. Drohan*, 264 Mich. App. 77, 89 n.4; 689 N.W.2d 750 (2004) (rejecting appellant's *Blakely* argument based on *Claypool*), *lv. granted*, 472 Mich. 881; 693 N.W.2d 823 (2005).

Petitioner thereafter appealed his sentence to the Michigan Supreme Court based on the same *Blakely* argument that he raised before the Michigan Court of Appeals. On August 30, 2005, the Michigan Supreme Court denied Petitioner's application for leave to appeal because it was "not persuaded that the questions presented should be reviewed by th[e] Court." (App. 30.)

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### REASONS FOR GRANTING THE WRIT

This case presents an issue that this Court failed to expressly decide in its opinion in *Blakely*. Other than for purely "determinate" or "indeterminate" sentencing schemes,



under what circumstances does a defendant's Sixth Amendment right to trial by jury apply to sentencing?

Michigan's sentencing guidelines are neither truly determinate nor indeterminate. In *Claypool*, however, the Michigan Supreme Court held that Michigan's sentencing guidelines are "indeterminate" and therefore "unaffected" by *Blakely*. *Claypool*, 470 Mich. at 730 n.14. The court characterized Michigan's sentencing guidelines as "indeterminate" because trial judges determine a minimum sentence range for defendants, but do not determine the maximum sentence for defendants (the maximum sentence is set by statute except in the case of habitual defenders). *Id.*

The Michigan Supreme Court's analysis and conclusion in *Claypool*, however, conflict with this Court's decision in *Blakely* in several respects. The *Blakely* court recognized that the Sixth Amendment is implicated whenever a judge exceeds the statutory maximum that the judge could impose based on facts found by the jury. *Blakely*, 542 U.S. at 303. "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (emphasis in original).

Although under the Michigan guidelines a defendant's maximum sentence is generally set by statute, a defendant's minimum sentencing range is determined by the court. Notably, the upper end of this minimum range (the "maximum minimum") still constrains the sentence that the court may impose, and a judge cannot exceed this maximum without additional fact-finding. *People v. Babcock*, 469 Mich. 247, 259; 666 N.W.2d 231 (2003). Thus,

Michigan's maximum minimum is a statutory maximum within the meaning of *Blakely*, and the imposition of a sentence exceeding the maximum minimum is subject to *Blakely*.<sup>1</sup>

Michigan's guidelines also include certain determinate intermediate sanctions that permit no more than a jail sentence of a limited length. Mich. Comp. Laws Ann. § 769.34(4). Such jail sentences are determinate within the meaning of *Blakely*, *People v. Martin*, 257 Mich. App. 457; 668 N.W.2d 397 (2003), and are therefore statutory maximums from which a sentencing court can depart only for substantial and compelling reasons. Mich. Comp. Laws Ann. § 769.34(4). Therefore, Michigan's intermediate sanctions are governed by *Blakely*.

The Michigan Supreme Court's determination that Michigan's sentencing guidelines are not subject to *Blakely* is also inconsistent with the Michigan legislature's intent in enacting the sentencing guidelines. *Blakely* is inapplicable to indeterminate sentencing schemes that are intended to provide unfettered judicial discretion in sentencing. *Blakely*, 542 U.S. at 305. Michigan's guidelines by contrast were specifically enacted to constrain and limit judicial discretion and replaced a prior indeterminate system. *People v. Garza*, 469 Mich. 431, 434-35; 670 N.W.2d 662 (2003); *People v. Hegwood*, 465 Mich. 432, 438-39; 636

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<sup>1</sup> As observed by this Court in *Apprendi v. New Jersey*, 530 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000), "[t]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. A Michigan court's departure from a maximum minimum undoubtedly exposes a defendant to greater punishment than would be permissible based on the jury verdict alone.

N.W.2d 127 (2001). The Michigan Supreme Court – in holding that *Blakely* is inapplicable to Michigan’s sentencing guidelines – has undermined this legislative intent and is, in fact, the very type of judicial decision that caused the Framers [to] put a jury-trial guarantee in the Constitution.” *Blakely*, 542 U.S. at 308.

The decision of the Michigan Supreme Court in *Claypool* therefore conflicts with this Court’s interpretation of the Sixth Amendment right to jury trial as described in *Blakely*. This conflict justifies the exercise of this Court’s jurisdiction.

Indeed, the summary treatment of this issue by the Michigan Supreme Court illustrates the necessity of granting *certiorari*. Only via the intervention of this Court will defendants such as Petitioner be able to protect their Sixth Amendment right to jury trial in the sentencing process. Without intervention, Petitioner and other defendants will be denied this constitutional right which is not simply a “procedural formality, but a fundamental reservation of power in our constitutional structure.” *Id.* at 306.

*Certiorari* is also appropriate because this Court’s review of this case will provide further guidance to other jurisdictions attempting to apply *Blakely* to their own sentencing schemes. As recognized by the dissent in *Blakely*, any number of jurisdictions employ sentencing guidelines of various forms, *Blakely*, 542 U.S. at 323 (O’Connor, J., dissenting), and each would benefit from a further elaboration by this Court of the circumstances under which *Blakely* applies to a sentencing system.

Finally, *certiorari* would also prove beneficial because Petitioner’s case is an excellent vehicle for examining these issues. As discussed above, Petitioner’s case presents

an almost identical fact scenario as *Blakely*. Moreover, Petitioner's case does not simply raise the question of maximum minimums, but also involves a crime that would have resulted in a determinate intermediate sanction but for additional judicial fact finding.

Petitioner's case raises an important Sixth Amendment issue that this Court first addressed in *Blakely* and that merits further review given its treatment by the Michigan Supreme Court. Therefore, this Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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